No. 1128

IN THE

Supreme Court of the United States

OCTOBER TERM 1946

MORRIS HEFLER, GEORGE LEVY and AL LEVY,

Petitioners,

—against—

UNITED STATES OF AMERICA.

PETITION AND BRIEF IN SUPPORT OF APPLICATION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

JACOB W. FRIEDMAN,
Attorney for Petitioners.

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UNITED STATES OF AMERICA,

PETITION FOR REHEARING

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Morris Hefler, George Levy and Al Levy, respectfully pray this Court to reconsider its determination made on April 28, 1947, denying their petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment convicting them of the crime of receiving goods alleged to have been stolen in interstate commerce.

The Court is referred to the original petition and brief filed herein in March, 1947, whose contents are reiterated and incorporated.

Petitioners, who are business men ranging in age from 50 to 63, have been convicted of a serious crime for which they not only served jail sentences but also have been

stigmatized for life and have forfeited important civil rights.

They believe that the conviction is tainted by a vital jurisdictional defect. They have insisted at all times on their complete innocence and they earnestly reiterate that they have been unjustly convicted. Wholly apart from the jurisdictional omission, the extreme closeness of the factual question was such that they could have received exact justice only through a trial reasonably free from serious error and by a scrupulous adherence to both the substantive rules and the procedural safeguards applicable to such cases. Their conviction is probably ascribable to a series of important and prejudicial rulings which resulted in their not being accorded a fair trial.

The questions at issue involve substantial points of criminal law and procedure, all of them of a character not infrequently arising in federal courts. It is desirable that these matters be clarified by a plenary review, to the end that the law be settled or better understood, and more specifically that these petitioners should not be made to suffer the further consequences of an unjust conviction.

Your petitioners therefore respectfully ask that a rehearing be granted herein, that the determination of this Court denying the writ of certiorari be set aside and that such a writ be granted.

New York City, May 20, 1947.

JACOB W. FRIEDMAN,
Attorney for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1946

MORRIS HEFLER, GEORGE LEVY and AL LEVY,

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—against—

UNITED STATES OF AMERICA.

BRIEF ON APPLICATION FOR REHEARING

I

Without intending to detract from the force of the other arguments advanced in our original brief, we direct the Court's attention to our assertion that the Government entirely omitted to prove that there was an original theft from one of the limited places necessitated by the statute upon which the prosecution was based (18 U. S. Code Sec. 409). This crucial omission was fatal to the efficacy of the attempted prosecution. It does not come under the heading of a circumstance which might have been shown had attention been directed thereto. It is rather a shortcoming which the Government could not have remedied in any case, for the attending facts strongly indicate its nonexistence.

The affirmance of the conviction herein is tantamount to a judicial declaration that a prosecutor may ignore the

statutory mandate as to the components of this particular crime and yet obtain a valid conviction. The holding in effect amends the statute by means of a construction which the words simply will not bear. This is not a case of abstruse language or of wording susceptible of more than one meaning. "Laws are made for men of ordinary understanding, and should, therefore, be construed by the ordinary rules of common sense" (Thomas Jefferson, in a letter to Justice William Johnson, June 12, 1823). The interpretation that the *locus e quo* may be dispensed with does violence to the obvious import of the words.

The prosecution must recognize the force of this contention, for its attempt to answer it falls far short of any semblance of adequacy. Recourse is had to what the defense "intended to concede." Mention is likewise made—and confirmation is sought therein—of the language of the charge to the effect that both sides stipulated that the goods were stolen while in interstate commerce. The patent weakness of the Government's position appears from its concession (brief, p. 5):

> "While it is true that the stipulation did not state in so many words that the goods were removed from a truck, a trucking company and the fact that the thief was a truck driver are mentioned."

The very circumstance that reliance must be placed upon the rather adventitious factor of the implication of a trucking company and a truck driver eloquently attests the case's shortcomings. This is immediately followed (p. 6) by the recognition that the stipulation was "deficiently worded."

We have examined the Government's argument in vain for any rebuttal of this cardinal point, and we feel that the failure of proof in so vital a particular is one that should not be overlooked.

II

The Government queries (footnote, p. 3) whether the completion of the service of the respective sentences herein does not render the case moot under the holding of this Court in *Fiswick* v. *United States* (No. 51, this term, decided December 9, 1946). We reply to this suggestion for the reason that the denial of the original petition may conceivably have been based, at least in part, upon some such consideration.

To begin with, the *Fiswick* decision is the outgrowth of the holding in *St. Pierre* v. *United States*, 319 U. S. 41, wherein the petitioner had failed to make an application to the Supreme Court for a stay. In the case at bar, however, the petitioners duly applied for such relief to the District Court, the Circuit Court of Appeals and a justice of the Supreme Court of the United States, all to no avail. It was quite impossible, notwithstanding utmost diligence, to bring the case to the Supreme Court of the United States for review before the expiration of the sentences of two of the petitioners.

In the second place, under the holdings in the *St. Pierre* and *Fiswick* cases, to entitle one to a review after the service of sentence, he must merely show that "under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied." It is thus held that the loss of civil rights, such as being rendered incompetent to serve on a jury or disqualification from voting or holding office unless pardoned, is deemed sufficient to justify appellate review after service of sentence. All of the petitioners come squarely within the purview of this rule, for New York Election Law, Section 152, so far as material, reads as follows:

"No person who has been convicted of a felony shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or received a certificate of good conduct granted by the board of parole pursuant to the provisions of the executive law to remove the disability under this section because of such conviction."

It is also clear that knowingly receiving stolen goods of the value of more than $100 is a felony under the law of New York (New York Penal Law, Section 1308). Finally, it has been held that a person convicted of a felony in the federal court is deemed disfranchised under the law of New York. 1912, Op. Atty. Gen. 339; 1911, Op. Atty. Gen. 407.

It is therefore clear that the conviction herein is of such character as to deprive petitioners of the right to vote, and this circumstance in and of itself suffices to constitute a continuing penalty as a result of which the present conviction may not be deemed moot. In the same connection we also submit that the conviction probably has the effect of disqualifying petitioners to act as jurors under New York Judiciary Law, Sections 502, 598, requiring that jurors be of good or at least fair character (see *Grant* v. *New York Herald Co.*, 138 App. Div. 727, 123 N. Y. S. 449).

III

In discussing our argument that the District Court erred in refusing to issue a writ of *habeas corpus ad testificandum* (p. 7, footnote), the Government cited the holding in *Gibson* v. *United States*, 53 F. 2d 721, cert. den. 285 U. S. 557, on the question of the power to issue such a writ effective in another district. An examination of that case, however, discloses that it relates merely to an application by a defendant to have a witness produced at the expense of the Government, whereas herein the petitioners were at all times willing to pay the expense of having the witness attend.

CONCLUSION

For the foregoing reasons, as well as those stated in the original petition and brief, petitioners respectfully urge this Court to rescind its determination of April 28, 1947, denying their petition for a writ of certiorari, and that it grant such writ to the United States Circuit Court of Appeals for the Second Circuit to review their conviction herein.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioners.